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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 17–18. The opinion of the Circuit Court of Appeals (R. 22–24) is reported in 62 F. (2d) 746.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 3, 1933 (R. 26). The petition for certiorari was filed February 15, 1933, and was granted March 27, 1933 (R. 26). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the comments of the presiding judge at the trial exceeded the proper bounds of judicial comment upon the evidence and thus constituted prejudicial error.

2. Whether failure to charge all the essential elements of the offense for which petitioner was being tried constituted prejudicial error.

STATEMENT

Petitioner and one Brogna were indicted for selling, dispensing, and distributing narcotics (R. 1). At the trial, one Hesse, a Government narcotic agent, testified that he had made a number of purchases of narcotics from Brogna and that on one occasion Brogna had been accompanied by petitioner, whom Brogna introduced to him as "the main connection." On that occasion petitioner discussed the price for which he would sell narcotics and, after a bargain had been struck, said, "Give the money to Joe. Joe will bring you back your stuff. I don't want to have anything to do with you in this business. You do all your business with Joe. He will be back with the stuff." "Joe" was Brogna, the other defendant in this case, who pleaded guilty. The witness paid the money to Brogna, as arranged, and Brogna delivered the narcotics to him. (R. 3–6.)

On another occasion the same witness went to Brogna's home to consummate a sale of seven

ounces of morphine. Brogna took him to 22 Dorrance Street, Boston, near the elevated, and directed him to wait there (R. 7). On this occasion another agent (Artis) observed Brogna leave Hesse and go directly to petitioner's home which he entered, shortly thereafter leaving the premises in company with petitioner. This witness followed petitioner and Brogna, but lost track of them. The petitioner shortly thereafter met Hesse, waiting near the elevated, where he made delivery of two ounces of morphine and received payment therefor. (R. 14–15, 8.) Shortly after this delivery and sale petitioner was arrested and his home was searched. A scale for weighing morphine, and a small quantity of narcotic drugs, were found in the house, and when petitioner's person was searched he was found to have in his possession currency which by its serial numbers was identified as having been paid by the witness to Brogna for the morphine purchased from him (R. 8–9). Quercia at no time delivered any narcotics to the witness, nor was he present when Brogna delivered narcotics (R. 13, 14). The testimony of other Government agents confirmed the testimony given by Hesse (R. 14–15). Quercia testified on his own behalf and made a general denial of all the charges, but his testimony is not set forth in the record (R. 15).

At the close of the evidence the defendant made a motion for a directed verdict, which was denied

(R. 15). The defendant thereupon presented certain requests for rulings which, in substance, renewed the motion for a directed verdict, and which were also denied (R. 16–17). The court charged the jury concerning the rules as to reasonable doubt and presumption of innocence, and ruled, as a matter of law, that if the jury believed the evidence for the Government it might find the defendant guilty under the indictment. The court also stated that its expressions of opinion on the evidence were not binding on the jury and that it was the jury's duty to disregard the court's opinion if they did not agree with it. (R. 17–18.) The charge continued as follows (R. 18):

> And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

The defendant excepted generally to the charge, and particularly to the court's ruling that if the jury believed the Government's evidence it might

find the defendant guilty under the indictment; exception was also taken to the portion above quoted in which the court expressed its opinion concerning the credibility of the defendant (R. 18). The jury returned a verdict of guilty on each count of the indictment (R. 19). Upon appeal, the Circuit Court of Appeals, one judge dissenting, affirmed the judgment of the District Court (R. 26).

SUMMARY OF ARGUMENT

The function of a Federal judge in a criminal case to advise the jury upon the facts and to express his opinions concerning the credibility of witnesses and the guilt or innocence of the accused, cannot be questioned. The exercise of this judicial function in a proper case is one of the most important duties which a trial judge has to perform in a Federal court, and the concept of trial by jury embodied in the Constitution includes this function as one of its essential elements. The judge may not, however, usurp the functions of the jury, and if his instructions may fairly be said to have been coercive upon the jury in their consideration of facts determinative of their conclusion upon the question of guilt, the charge is erroneous, even though in form it is an expression of the court's opinion and the jury is told that, after all, they are to determine the facts.

We think a portion of the charge complained of in the instant case was improper, and that this

Court should determine whether it was unfair and coercive. The question is peculiarly one for the judgment of this Court, in the exercise of its supervisory control over the inferior Federal courts. We therefore submit the case without contention either that the judgment should be affirmed or that it should be reversed.

With the exception of that portion of the charge commenting upon the credibility of the defendant and his appearance upon the stand, no error appears in the instructions of the trial court.

ARGUMENT

I

The power of Federal judges to comment upon the evidence and to advise the jury concerning facts determinative of their verdict, is not disputed. Trial by jury in the courts of the United States is a trial presided over by a judge who is "not a mere moderator" but "is the governor of the trial" charged with the duty, where in his judgment the due administration of justice requires, to aid the jury by explaining and commenting upon the testimony and expressing his opinion on questions of fact, provided only he submits those questions to the jury for their determination. See *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U.S. 545, 553; *United States* v. *Philadelphia & Reading R. Co.*,

123 U.S. 113, 114.[1] No doubt this broad authority includes fair comment upon the credibility of any witness. This important function of the trial judge is derived from the common law and was recognized in England and in this country at the time the Constitution was adopted.[2] It is therefore embedded in the constitutional concept of trial by jury. See *Patton* v. *United States*, 281 U.S. 276, 288–290; *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 13–14; *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95.[3] State laws forbidding the expression

[1] See also *McLanahan* v. *Universal Ins. Co.*, 1 Pet. 170, 182; *Carver* v. *Astor*, 4 Pet. 1, 80, 81; *Magniac* v. *Thomson*, 7 Pet. 346, 390; *Tracy* v. *Swartwout*, 10 Pet. 80, 96; *Games* v. *Dunn*, 14 Pet. 322, 327; *Mitchell* v. *Harmony*, 13 How. 115, 131; *Transportation Line* v. *Hope*, 95 U.S. 297, 302; *Rucker* v. *Wheeler*, 127 U.S. 85, 93; *Lovejoy* v. *United States*, 128 U.S. 171; *Baltimore & Potomac R. Co.* v. *Fifth Baptist Church*, 137 U.S. 568, 574; *Simmons* v. *United States*, 142 U.S. 148; *Doyle* v. *Union Pacific R. Co.*, 147 U.S. 413, 430; *Lincoln* v. *Power*, 151 U.S. 436, 442; *Allis* v. *United States*, 155 U.S. 117, 123; *Wiborg* v. *United States*, 163 U.S. 632, 656; *Graham* v. *United States*, 231 U.S. 474, 480; *Crowell* v. *Benson*, 285 U.S. 22, 61.

[2] See Sir Matthew Hale, *Common Law of England* (6th ed.), 346, 353; 3 *Bl. Comm.*, 375; *Solarte* v. *Melville*, 7 Barn. & Cress. 430; *Davidson* v. *Stanley*, 2 Man. & Gr. 721; *Taylor* v. *Ashton*, 11 M. & W. 401. See also *State* v. *Bennett*, 3 Brev. (S.C.) 514; *Bigelow* v. *Timmerman*, 12 Wend. (N.Y.) 299; *People* v. *White*, 14 Wend. (N.Y.) 111, 116; *Donnelly* v. *State*, 26 N.J.L. 463, 479–480; *Kilpatrick* v. *Commonwealth*, 31 Pa. St. 198, 216; *Commonwealth* v. *Burk*, 81 Mass. 404, 406.

[3] Despite the declarations of this Court that the power of Federal judges to comment upon testimony and evidence adduced before them is an essential factor in the process of

of the judge's opinion upon the facts in trials by jury are not binding upon the Federal courts.[4] *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94;

trial by jury for which the Constitution provides, proposals to prohibit the Federal judges from expressing their opinions on the facts have frequently been introduced in Congress. See, for example, *72d Cong., 1st Sess.*: S. 640, referred to Judiciary Committee but not reported; *71st Cong., 1st Sess.*: S. 374, referred to Judiciary Committee but not reported; *70th Cong., 1st Sess.*: S. 1094, referred to Judiciary Committee and reported out favorably (S.Rep. 93), passed Senate as amended, March 19, 1928, referred to House Judiciary Committee and not reported out; *69th Cong., 1st Sess.*: S. 455, referred to Judiciary Committee and reported out favorably (S.Rep. 842); S. 712, referred to Judiciary Committee but not reported; H.R. 3918, referred to Judiciary Committee but not reported; *68th Cong., 1st Sess.*: S. 624, amended and passed by Senate and reported favorably by House Judiciary Committee (H.Rep. 816); H.R. 3260, amended and reported favorably by House Judiciary Committee (H.Rep. 365); H.R. 2910, H.R. 4509, and H.R. 4821, all referred to Judiciary Committee but not reported out; *67th Cong., 1st Sess.*: S. 400, referred to Judiciary Committee but not reported; *66th Cong., 1st Sess.*: S. 228, referred to Judiciary Committee but not reported; *65th Cong., 2d Sess.*: H.R. 9354, reported favorably by House Judiciary Committee (H.Rep. 284); *64th Cong., 1st Sess.*: S. 1412, Sec. 164, referred to Judiciary Committee but not reported; *63d Cong., 1st Sess.*: S. 389, referred to Judiciary Committee but not reported; H.R. 2487, referred to Judiciary Committee but not reported; *62d Cong., 3d Sess.*: S. 8007, referred to Judiciary Committee but not reported; *60th Cong., 1st Sess.*: H.R. 12441, referred to Judiciary Committee but not reported; *59th Cong., 1st Sess.*: H.R. 7611, referred to Judiciary Committee but not reported.

[4] As early as 1796 Tennessee had provided in its constitution that judges could not "charge juries with respect to matters of fact" (Constitution of 1796, Art. 5, Sec. 5), and

Gasoline Products Co. v. *Champlin Co.*, 283 U.S. 494, 498; *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 376–377, 397; *St. Louis, Iron Mt. & Southern Ry. Co.* v. *Vickers*, 122 U.S. 360, 363; *Vicksburg & Meridian R. Co.* v. *Putnam*, 118 U.S. 545, 553; *Nudd* v. *Burrows*, 91 U.S. 426.

This prerogative of the trial judge, resting as it does upon constitutional guaranties, is beyond the control of the Congress and of the State Legislatures. But this does not mean that it is a power unregulated and uncontrolled in its exercise. Indeed, the Circuit Courts of Appeals and this Court have been extremely sensitive to any claim that this power has been abused and in every case the comments of the trial judge are open to the most careful scrutiny and review. This case presents such a question.

The constitutional authority of the trial judge to analyze and classify the evidence and to aid the jury by giving them the benefit of the court's views on controverted questions of fact is not drawn into question in this case. Petitioner's contention is solely that the power was abused and that prejudicial error was committed by the judge in the instant case.

In his charge to the jury the District Judge, after instructing the jury that if they believed the evi-

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many States have since enacted specific prohibitions against the expression of opinions on the testimony by trial judges. See Edson R. Sunderland, *The Inefficiency of the American Jury*, 13 Mich. L. Rev. 302, 307, *et seq.*

dence for the Government they might find the defendant guilty, said (R. 18):

> And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

The majority of the court below dismissed petitioner's objection to this portion of the charge, because it considered that the jury would naturally disregard a comment of this kind and could not have taken it seriously (R. 24). The court was further of the opinion that since the testimony of the defendant to which the trial judge referred was not printed in the record, the defendant might have deserved the characterization and hence could not have been prejudiced by the judge's remarks (R. 24).

The permissible limits of comment by trial judges have been fairly well defined by numerous decisions in the Federal courts. While each case must, in final analysis, be determined by reference to the

particular circumstances involved (*Stokes* v. *United States,* 264 Fed. 18, 25 (C.C.A. 8th)), the principle running through all the decisions is that the ultimate decision of the facts upon which guilt or innocence rests must be left to the decision of the jury. The opinion has been expressed that though forceful, unfair, or irrelevant statements by the presiding judge are to be deprecated, they do not constitute reversible error if the jury is told in terms that the statement is but an opinion and must give way if found to be in conflict with the convictions of the jurors. See *Lincoln* v. *Power,* 151 U.S. 436, 442; *Morse* v. *United States,* 255 Fed. 681, 682 (C.C.A. 4th); cf. *Buchanan* v. *United States,* 15 F. (2d) 496, 498 (C.C.A. 8th); *Chafin* v. *United States,* 5 F. (2d) 592, 596 (C.C.A. 4th), certiorari denied, 269 U.S. 552; *Tuckerman* v. *United States,* 291 Fed. 958, 964–965 (C.C.A. 6th), certiorari denied, 263 U.S. 716. This is the general rule, but in view of the fact that the jury is readily swayed by expressions of the court's opinion concerning the facts in any particular case, mere explanations that the opinion of the judge is not binding on the jury have under varying circumstances been held inadequate to counteract the influence of unwarranted statements from the bench. See *Starr* v. *United States,* 153 U.S. 614, 624 *et seq.; Hicks* v. *United States,* 150 U.S. 442, 452; *Parker* v. *United States,* 2 F. (2d) 710, 711 (C.C.A. 6th); *Sandals* v. *United*

States, 213 Fed. 569, 576 (C.C.A. 6th); *Cook* v. *United States,* 14 F. (2d) 833, 834 (C.C.A. 8th).

The rule that a mere formal declaration of the functions of court and jury may not be sufficient to erase the coercive effect of what has gone before, has found expression where the trial judge, abandoning dispassionate analysis and examination designed to assist the jury in arriving at its own decision, tinctured his charge with advocacy to persuade or coerce the jury to adopt his views. *Minner* v. *United States,* 57 F. (2d) 506, 513 (C.C.A. 10th); *Leslie* v. *United States,* 43 F. (2d) 288 (C.C.A. 10th); *O'Shaughnessy* v. *United States,* 17 F. (2d) 225, 228 (C.C.A. 5th); *Barham* v. *United States,* 14 F. (2d) 835, 836 (C.C.A. 8th); *Carney* v. *United States,* 295 Fed. 606 (C.C.A. 9th). In short, it is settled that the trial court's opinion may properly be expressed and the evidence may be made the subject of comment only when the ultimate decision is clearly left to the jury and when the expression is so free from the distortion of advocacy as to insure that the judgment of the jury will not be coerced.[6] See *Malaga* v. *United*

[6] In some instances "expression of opinion" has been so unguarded as to amount to an instructed verdict of guilty. In such cases, as here, the objection is that the province of the jury has been invaded, though in form the comments of the court were not binding instructions. See *Dinger* v. *United States,* 28 F. (2d) 548 (C.C.A. 8th); *La Rosa* v. *United States,* 15 F. (2d) 479 (C.C.A. 4th). See also *Weare* v. *United States,* 1 F. (2d) 617 (C.C.A. 8th). Cf. *Vecchio* v. *United States,* 53 F. (2d) 628, 631–632 (C.C.A. 8th).

States, 57 F. (2d) 822 (C.C.A. 1st); *Hunter* v. *United States,* 62 F. (2d) 217, 220 (C.C.A. 5th); *Cook* v. *United States,* 18 F. (2d) 50 (C.C.A. 8th). Cf. *Lemmons* v. *United States,* 62 F. (2d) 608 (C.C.A. 10th); *Morris* v. *United States,* 19 F. (2d) 131 (C.C.A. 8th), certiorari denied, 275 U.S. 543.

The comment of the judge should, of course, be limited to the facts in evidence and no distortion or alteration of the facts, under the guise of stating the opinion of the court, may be permitted. Thus, in *Hickory* v. *United States,* 160 U.S. 408, the judge, commenting upon the fact that the defendant had fled following the commission of a crime of which he was charged, told the jury that the wicked flee after a crime, but that the innocent do not. This expression of opinion that no innocent person would be tempted to absent himself or to resort to concealment was held by this Court to be in effect a charge that all persons who did so were guilty, a conclusion unsupported by any evidence, and a distortion of the actual facts that had been presented on the trial. Similarly, in *Allison* v. *United States,* 160 U.S. 203, 209, the judge instructed the jury that before acquitting the defendant, who had pleaded self-defense, they should have something more tangible than the defendant's own recital of the facts upon which his defense was based. The court remarked that "All men would say that", referring to the defendant's story of self-defense. This comment was held to be erroneous

and the judgment was reversed. In *Mullen* v. *United States,* 106 Fed. 892 (C.C.A. 6th), the court, composed of Lurton, Day, and Severens, JJ., held erroneous an intimation by the trial judge to the jury that he believed the defendants were not of good character, though in fact there was no evidence of character in the case. Although the judge added that the jury was not bound by his comments, the court held that a Federal judge could express no opinion upon facts except when the opinion was based upon evidence before the jury. In *Kolp* v. *United States,* 2 F. (2d) 953 (C.C.A. 6th), the relative credibility of witnesses for the Government and for the defense was of determinative importance. In ordering a new trial, the appellate court said (p. 954):

> Any opinion that he (the trial judge) may express should be based upon more than mere impressions. To state that "personally I am inclined to believe practically all of them (defendants' witnesses) were engaged in the business [liquor] out there", when there was no evidence in the case on which to base such a belief, is an invitation to the jury likewise to base their conclusions, not upon the testimony, or the witnesses' appearance and manner of testifying, or their apparent interest or bias, but upon impressions and surmises. In this and other respects the charge appears to us to have more of the aspect of argument and advocacy than is permissible.

Cf. *Ward* v. *United States,* 4 F. (2d) 772 (C.C.A. 9th); *Russell* v. *United States,* 12 F. (2d) 683, 692 (C.C.A. 6th), certiorari denied, 273 U.S. 708.

It is a matter of the gravest importance to the fair administration of justice in the Federal courts that the authority of the trial judge as the governor of the trial charged with the duty of aiding the jury in determining the guilt or innocence of the accused, should not be abused by any attempt to impose upon the jury the personal convictions of the judge, however well founded such convictions may be. In this case the vigorous, unqualified, and intemperate expressions of the judge's conviction that "every single word that man (the defendant) said, except when he agreed with the Government's testimony, was a lie", must have had a profound effect upon the members of the jury. The bald assertion that wiping one's hands on the witness stand was almost always an indication of lying, reinforced by the statement from the judge's experience, "Why it should be so we don't know, but that is the fact", followed by the conclusion that every word the man uttered was a lie except when he agreed with the Government's testimony, may well have been accepted by the jury as a judgment, predicated upon years of observation and experience upon the bench, entitled to profound respect and not to be rejected in considering the defendant's only defense, which was founded upon his denial of the testimony of two agents of the Government.

The full force of the judge's observations fell upon the issue of the credibility of the defendant. The opinion itself was founded, if at all, upon facts not in evidence and there is no indication of its inherent probability or accuracy.

The defendant was a witness in his own behalf and, so far as appears from the record, his credibility had not been attacked by the Government. The issue whether he was to be believed was for the jury; and the instruction amounted to a statement of fact unsupported by evidence which, in all probability, operated to withdraw from the jury consideration of a question which should have been left solely to their decision. See *Smith* v. *United States*, 161 U.S. 85, 90; cf. *Reagan* v. *United States*, 157 U.S. 301, 305.

It was said in *Rudd* v. *United States*, 173 Fed. 912, 914 (C.C.A. 8th):

> We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that

> the jurors, who are the triers of them, may be left free to exercise their independent judgment.

This important function will be unimpaired so long as it is not abused, and it is for this Court to say whether in this case the court deprived the defendant of that fair and impartial trial of the issues by a jury to which he was entitled under the Constitution.

II

Petitioner contends that the trial court erred in instructing the jury that if they believed the evidence for the Government, they could find the defendant guilty under the indictment; and in refusing certain requests for rulings by the defendant.

The jury was instructed upon the question of reasonable doubt and presumption of innocence (R. 17), and then the court told the jury that if they believed the evidence for the Government, they might find the defendant guilty under the indictment (R. 18). Thus qualified by a statement of the rules as to reasonable doubt and presumption of innocence, the instruction that the jury might find guilt if the testimony was believed was, as the court below concluded, a correct statement of the law.[7] The testimony of the Government witnesses

[7] While we believe that the decision of the court below on this branch of the case is unquestionably correct, it may be added that the defendant's objection to this portion of

comprehended all elements of the crime for which the defendant was being tried, and the language now complained of "amounted to no more than advising the jury of what, under the evidence presented, would be sufficient to justfy a verdict." See *Wishart* v. *United States,* 29 F. (2d) 103, 105 (C.C.A 8th). See also *Horning* v. *District of Columbia,* 254 U.S. 135, 138; cf. *Transportation Line* v. *Hope,* 95 U.S. 297, 302.

The requests for rulings (R. 16–17) were in effect requests for peremptory instructions to acquit because of the alleged failure of the Government to prove necessary elements of the crimes charged, and the exceptions to the court's refusal to rule as requested added nothing to the exception to the denial of the defendant's earlier motion for a directed verdict. The evidence was found sufficient by the jury and by both courts below and, in the absence of exceptional circumstances altogether lacking here, there is no reason for further inquiry by this Court into the sufficiency of the evidence to sustain the conviction. See *Burton* v. *United States,* 202 U.S. 344, 373. Passing on a motion for

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the charge, being a mere general exception without specification of the precise reasons underlying it (R. 18), was not sufficient to bring to the attention of the trial court the alleged error in the charge. The purpose of an exception is to enable the judge to correct errors by making specific reference to the asserted ground of complaint. The objection in this instance failed to fulfill that function. See *Burns* v. *United States,* 274 U.S. 328, 336; *Thiede* v. *Utah,* 159 U.S. 510, 521.

a directed verdict of acquittal or the equivalent of such a motion, the trial court must take the view of the evidence most favorable to the Government. See *O'Brien* v. *United States,* 51 F. (2d) 674, 676 (C.C.A. 7th); *Rendleman* v. *United States,* 38 F. (2d) 779 (C.C.A. 9th); *Zottarelli* v. *United States,* 20 F. (2d) 795, 796 (C.C.A. 6th), certiorari denied, 275 U.S. 571; *Felder* v. *United States,* 9 F. (2d) 872, 875 (C.C.A. 2d), certiorari denied, 270 U.S. 648. Since there was substantial evidence to support the verdict, the giving of the requested instructions would have constituted error. See *Pierce* v. *United States,* 252 U.S. 239, 251; *McLendon* v. *United States,* 14 F. (2d) 12, 15–16 (C.C.A. 5th), certiorari denied, 273 U.S. 729. Petitioner has no valid complaint concerning the rulings of the court in this respect.

CONCLUSION

We submit the case for decision without contending either for affirmance or reversal of the judgment of conviction, believing, however, that the charge of the court was improper and that this Court should consider whether it was unfair and coercive.

Respectfully submitted.

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